No. 12,275

IN THE

United States Court of Appeals

For the Ninth Circuit

P. W. CARLSTROM and MRS. GEORGE (RETA) TAITT, individually and as co-partners, doing business under the firm name and style of Associated Packing Co.,

Appellants,

vs.

AGRICULTURAL INSURANCE COMPANY, a corporation; FEDERAL UNION INSURANCE COMPANY, a corporation; GLOBE AND RUTGERS FIRE INSURANCE COMPANY, a corporation; THE HOMESTEAD FIRE INSURANCE COMPANY, a corporation; NEW HAMPSHIRE FIRE INSURANCE COMPANY, a corporation, et al.,

Appellees.

BRIEF FOR APPELLEES.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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BRIEF FOR APPELLEES.

AS TO PLAINTIFFS' STATEMENT OF THE CASE.

While this appeal is confined solely to that portion of the judgment denying interest, there is an attempt

to inject the question of appraisement. This question is not before this Court.

AS TO PLAINTIFFS' SPECIFICATION OF ERROR.

It is stated, that the District Court erred by failing to conform to the decisions of the Supreme Court of the United States and the Supreme Court of California.

In the case of *Concordia Insurance Company v. School District No. 98,* 51 S. Ct. 27, 282 U.S. 545, 75 L. Ed. 528, the Supreme Court merely held that the District Court was justified in allowing interest "when necessary in order to arrive at fair compensation" where the trial Court would not say what position the Supreme Court of the State could take. Incidentally, this was considered by this Court in *National Union Fire Insurance Co. v. Cal. Cotton Credit Corporation,* 76 Fed. (2d) 279, 289, 290, where it is stated:

> "In Concordia Ins. Co. v. School Dist., etc., 282 U.S. 545, 51 S. Ct. 275, 278, 75 L. Ed. 528, the Supreme Court had under consideration a case very similar to the case at bar. In that case interest had been allowed on the amount recovered on a fire insurance policy beginning 60 days from the last date upon which proofs of loss were due under the terms of the policies. The statutes of Oklahoma (Comp. Okla. Stat. 1921, §§ 5972, 5977) relied on as controlling such allowance of interest were almost identical in language with those of California above quoted. The Supreme Court in its opinion stated the general rule that a Fed-

eral Court will follow the decisions of the highest court of a state construing a state statute, and then proceeded to review the decisions of the Supreme Court of Oklahoma construing the statutes above referred to. The conclusion reached by the court was that the state Supreme Court had not definitely construed the statute as applied to the situation then under consideration at the time the trial court entered its judgment, so that the federal court was free to construe the statute for itself. Mr. Justice Sutherland, speaking for the court, then stated: 'In the absence of an authoritative state decision to the contrary, there was nothing in either (sections 5972, 5977, Comp. Okla. Stat. 1921) which required the trial court in rendering its judgment to depart from the rule in respect of the allowance of interest which this court had recognized, namely, that, even in a case of unliquidated damages, "when necessary in order to arrive at fair compensation, the court in the exercise of a sound discretion may include interest or its equivalent as an element of damages." Miller v. Robertson, 266 U.S. 243, 257-259, 45 S. Ct. 73, 78, 69 L. Ed. 265, and cases cited. See, also, Standard Oil Co. v. United States, 267 U.S. 76, 79, 45 S. Ct. 211, 69 L. Ed. 519; Bernhard v. Rochester German Ins. Co., 79 Conn. 388, 397, 65 A. 134, 8 Ann. Cas. 298.' "

We shall discuss *Koyer v. Detroit Fire & Marine Ins. Co.* later.

ARGUMENT.

(a) THE LOSS WAS NOT CAPABLE OF DETERMINATION BY CALCULATION.

1. Interest is allowable only by virtue of statute.

This point is agreed upon by this Court and by the Supreme Court of California. This Court held as follows:

> "Appellee has filed a cross-appeal and assigns as error the failure of the trial court to allow interest from August 1, 1930, the date on which payment was due under the terms of the policies sued on. On July 31, 1933, the trial court ordered that judgment be entered for appellee and against appellants in the amounts set forth in the order, and further that findings of fact and conclusions of law be filed. The conclusions of law, subsequently filed, in part read as follows: '* * * together with interest thereon at the rate of seven per cent per annum from the 29th day of July, 1933, to and including the date of judgment. * * *' Judgment was entered on the findings on November 18, 1933. It is apparent from these facts that the trial court considered these claims to be unliquidated, and, until their amounts were ascertained preparatory to the entry of judgment, no interest should be allowed.
>
> "Cross-appellant contends it was entitled to interest from August 1, 1930, basing its contention on sections 3287, 3302, of the Civil Code of California, which provide:
>
> '§ 3287. *Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to*

recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt.

'§ 3302. The detriment caused by the breach of an obligation to pay money only, is deemed to be the amount due by the terms of the obligation, with interest thereon.'"

National Union Fire Ins. Co. v. Cal. Cotton Credit Corporation, 76 Fed. (2d) 279, 289, 290.

A similar statute was construed by this Court and the following was approved.

"If evidence is necessary to establish the amount of the claim, then interest anterior to judgment is not allowable. 'Where, however, the demand is for something which requires evidence to establish the quantity or amount of the thing furnished or the value of the services rendered, interest will not be allowed prior to judgment.'"

Hansen & Rowland v. C. F. Lytle Co., 167 F. (2d) 170, 175.

Koyer v. Detroit Fire & Marine Ins. Co., 9 Cal. (2d) 336, 70 P. (2d) 927, is not only not in opposition to the decisions of this Court, but is definitely in agreement when the portion of the opinion which counsel has omitted is considered. The Court says:

"Whether interest was chargeable prior to judgment depends upon the application of section 3287 of the Civil Code, under which interest runs

on claims for damages certain or capable of being made certain from the date the right of recovery is vested. If, therefore, the amount of plaintiff's loss was capable of being made certain by calculation, interest was allowable from July 12, 1933, when the loss became payable. It would seem to admit of no doubt that an ordinary fire or earthquake loss is adjusted by calculation, whether it be a total or a partial loss. Preliminary proofs of loss are calculations of the loss, as are also the estimates of appraisers, and these are the methods of adjustment contemplated by the parties and stipulated in the policies. *Resort may be had to court action only in the event the calculations of the parties or those of their appraisers are not in agreement. The amount awarded plaintiff by the jury conformed closely to the amount claimed in the proofs of loss.*

In other words, the Court held:

1. The recovery of interest depends upon the application of Section 3287 of the Civil Code, which is the basis for the decision of the Court of Appeals in the *National Union* case;

2. That recovery of interest can be had only where the damages are "certain or capable of being made certain from the date the right of recovery is vested";

3. That "the amount awarded plaintiff by the jury conformed closely to the amount claimed in the proofs of loss";

4. "The loss in question was capable of being made certain by calculation".

The Court cites *National Union Fire Insurance Co. v. California Cotton Credit Corp.,* (C.C.A.) 76 F. (2d) 279 in support of its conclusions.

As to the cases cited in the *Koyer* case, interest was not allowed in *Mabrey v. McCormick; National Union v. Cal. C. C. Corp.; Perry v. Magneson.* In the other cases the question of interest was incidental, the amount recovered was practically identical with the claim, or it was capable of being calculated.

A very well considered case is

Johnson v. Hanover Fire Ins. Co., (Wyo.) 137 P. (2d) 615, 59 Wyo. 120.

This case cites and follows *National Union v. Cal. C. C. Corp.*

In 26 C. J., p. 575, Sec. 795, which is substantially reiterated in 46 C.J.S. p. 696, Sec. 1393, it is said that

> "Where the amount to which insured is entitled is withheld after payment is due, interest on the amount found due may be allowed as damages in an action on the policy * * * But where the loss is partial only, and the insurer is unable to estimate its amount and ascertain the sum to be paid, it has been held inequitable to charge the insurer with interest."

In 154 ALR 1356, 1361, it is said,

> "The general rule has been stated to the effect that interest is not recoverable upon unliquidated demands until after they have been merged

in a judgment." To the same effect, see 7 Couch, Cyclopedia of Insurance Law, p. 6191, Sec. 1865.

2. As to appraisal.

As we have already pointed out, the question of appraisal, or lack thereof, is not involved. It was not brought up in the pleadings or in the trial; nor is it in the Agreed Statement of Facts, nor in this appeal. It will be noted from quotation from the policy set forth in the Agreed Statement that only the company can demand appraisal and that there is no penalty provided for failure so to do, except that in the event that no demand for appraisal is made, suit may be brought at the end of ninety days after filing proofs of loss.

Neither the *Koyer* case nor the question of arbitration are strangers to this Court. They were thoroughly discussed in the re-hearing of

Hyland v. Millers Nat. Ins. Co., 92 F. (2d) 462,

which we had the pleasure of arguing before this Court, and in which certiorari was denied.

3. As to the findings of the District Court.

This case was originally submitted in January, 1948. It was re-opened, and proceeded in May, October and November, to permit plaintiffs to prove quantities and values. Even after this protracted trial and detailed briefs by both sides, the Court in its order of February 18, 1949, was forced to estimate the quantities of troughs and their value. As

to slats, the Court says: "admittedly, this amount must be an estimate." (Agreed Statement p. 17.)

If the Court was forced to "estimate" quantities and values, after hearing the evidence and reading the briefs, how can it in good conscience be argued that plaintiffs were "entitled to recover damages certain, or capable of being made certain by calculation"? Yet this is the condition imposed by statute on the recovery of interest.

This Court has had occasion to consider a similar statute and to approve the rule that:

> "If evidence is necessary to establish the amount of the claim, then interest anterior to judgment is not allowable. 'Where, however, the demand is for something which requires evidence to establish the quantity or amount of the thing furnished or the value of the services rendered, interest will not be allowed prior to judgment.'"
> *Hansen & Rowland v. C. F. Lytle Co.,* 167 F. (2d) 170, 175.

In view of the fact that after the present case had been submitted on the evidence, arguments and written briefs, upon the sole question of *"What was the market value, on October 6, 1945, of the lumber and shell troughs destroyed by the fire?"* (Agreed Statement, p. 10), it would seem self-evident that the damages were not "certain or capable of being made certain by calculation." It will be noted that this question did not, at that time, involve any "slats", or their values. We shall discuss these more fully later in this brief.

Even after the submission of the issues on this question plaintiffs considered it necessary, and the Court granted their request, to re-open the case "for the purpose of taking further testimony." (Agreed Statement, p. 14.) "Upon re-opening the case for further trial, evidence was introduced on behalf of plaintiffs as to the quantity of troughs *and slats.*" (p. 14.) This evidence was offered on May 27 and 28. Plaintiffs were given further opportunities and offered further evidence on October 27 and 28, and again on November 5, and the case was re-argued on November 12. (p. 15.)

Yet, we find that when the Order for Judgment was given on February 18, 1949 (Agreed Statement, p. 16)

> "Testimony as to value was so conflicting as to make the court's task of ascertaining actual worth of the troughs all but impossible. The testimony offered by plaintiffs in connection with the possible commercial advantages and purposes to which the lumber contained in the troughs might be suited was not convincing and no predicate established for a value save and except a bare minimum value for the troughs as is. The realities of the situation are ever present and notwithstanding the hopeful expectations of plaintiffs as to the possible use to which the lumber might have been put, the fact remains that there was no credible testimony indicating an immediate commercial use for the lumber contained in the troughs." (Agreed Statement, p. 16.)

"With respect to the slats involved in the litigation: The court once more is compelled to express concern at the great variation in figures disclosed by the testimony of the witnesses and as revealed by the documents submitted in evidence. From these variations the court has been forced to choose an amount certain, which it deems to be the most accurate estimate of the quantity of slats on hand and destroyed by the fire. Admittedly, this amount must be an estimate * * *." (p. 17.)

"Although the record is replete with inconsistencies and backtrackings on the part of several of plaintiffs' witnesses, the court is not prepared to hold that such inconsistencies attain the stature of fraud." (p. 18.)

In view of these statements of the trial Judge, let us re-examine the *Koyer* decision.

"Whether interest was chargeable prior to judgment depends upon the application of Section 3287 of the Civil Code, under which interest runs on claims for damages certain or capable of being made certain from the date the right of recovery is vested. If, therefore, the amount of plaintiff's loss was capable of being made certain by calculation, interest was allowable * * *". (p. 931.)

The Order of the trial Court and the statements just above quoted show beyond dispute that no such condition existed in this case, and that quantities and values necessarily were estimates.

The vital factor in the *Koyer* case is contained in the following statement:

> "Resort may be had to court action only in the event the calculations of the parties or those of their appraisers are not in agreement. The amount awarded plaintiff by the jury conformed closely to the amount claimed in the proof of loss." (p. 931.)

In the present case the findings of the Court did not conform to any claim of the plaintiffs in any respect, whether as to amount of insurance, quantities or values. In this respect the case is similar to the *National Union* case, in which this Court said (p. 290):

> "It is argued by cross-appellant that the damages allowed by the court were certain by calculation and reference to readily ascertainable and fixed market values, and that the right to such damages became vested on the date payment was due under the terms of the policies, that is 60 days after filing proofs of loss on May 31, 1930. While it is true that the method of determining the liability of the insurers is set forth in the policies it remained for the court to ascertain the amount of such liability from the evidence introduced at the trial. *It is to be noted that in no case was the amount recovered on any claim as large as the amount claimed in the proofs of loss, nor was the liability of the insurers determined by the court on the same basis as that used in making out the proofs of loss.*
>
> "No case decided by the Supreme Court of California has been called to our attention, and we have found none that is controlling in the situation presented in the case at bar. In Anselmo v. Sebastiani, 219 Cal. 292, 26 P. (2d) 1, the bill of

particulars furnished by the plaintiffs to defendants was found by the court to be correct, and interest was allowed prior to the entry of judgment under Civil Code, § 3287, because the amount due could be determined by mere calculation from the bill of particulars. The court in that case tends to the view that whether the damages are liquidated or unliquidated is not determinative of the question of interest. In Gray v. Bekins, 186 Cal. 389, 399, 199 P. 767 in an action for recovery on the basis of quantum meruit, the court allowed interest from the date the answer was filed because the answer was construed to be an acknowledgment of the plaintiff's claim to the extent therein admitted and subsequently found due by the trial court. In that case the court stated the test to be applied was whether or not the exact amount found to be due was known and admitted by defendant to be due plaintiff. In Perry v. Magneson, 207 Cal. 617, 622, 279 P. 650, in an action on a contractor's indemnity bond, it was held that it was necessary for plaintiff to prove a loss by reason of breach of the building contract before he was entitled to recover on the bond and until the amount of such loss was determined by the court, the claim was uncertain and unliquidated and no interest should be allowed. In Mabrey v. McCormick, 205 Cal. 667, 669, 272 P. 289, the California Supreme Court stated: 'plaintiffs claim interest from the date of the third bill rendered by them, at which time they state the amount due became certain (section 3287, Civ. Code). Had the court found for them, this contention would be sound.'

"The court, however, decided that it was by reason of the action of plaintiffs that the amount due

was unliquidated until determined by judgment of the court so that interest prior to judgment, as damages, was not allowable.

"If the proofs of loss filed by the insureds in the case at bar had set out the claims in the manner and amounts as subsequently found due by the trial court, it would seem to follow from the above cases that interest would be allowable from the date payment became due under the policies. However, the appellee did not furnish data to the appellants in the proofs of loss from which appellants' liability could be calculated as was actually found due by the trial court, and, until their liability was determined by the trial court, it remained uncertain."

This case is decisive of the point at issue. It is apparent, not only from the facts in the re-opening of this matter, the evidence introduced, the judgment for $31,153.52, instead of the amount claimed, and from the written opinion of the court that:

1. "The damages allowed by the Court were 'not' certain by calculation and reference to readily ascertainable and fixed market values"; (p. 290.)

2. "It remained for the Court to ascertain the amount of such liability from the evidence introduced at the trial;" (p. 290.)

3. "That in no case was the amount recovered on any claim as large as the amount claimed in the proofs of loss"; (p. 290.)

4. "Nor was the liability of the insurers determined by the Court on the same basis as that used in making out the proofs of loss." (p. 290.)

We find a similar decision, denying interest.

Merchants Ins. Co. v. Lilgcomont, 84 Fed. (2d) 685, which relies on the decision in

Concordia Ins. Co. v. School District, 282 U.S. 545, 51 S. Ct. 275, 75 L. Ed. 528.

There is no need of discussing *Jacobs v. Farmers Mutual,* 5 C.A. (2d) 1, 41 P. (2d) 960, as the holding is based upon what the Court designates a "mere unwarranted denial of the validity of the contract on the part of the company." There is nothing in common in the two cases.

There is also no need to answer the "argument" that, although the policies in the *National Union* case contained the same conditions, the decision is not applicable because the insurance was market and crop insurance.

(b) AS TO VARYING POSITIONS TAKEN BY PLAINTIFFS.

At no time, either before or during the trial, were plaintiffs consistent in their demands or contentions.

The Court held against them on every contention, except in permitting recovery for troughs in an amount of Nineteen Thousand One Hundred Fifty Three and 52/100 ($19,153.52) Dollars rather closely approximating the amount of loss admitted by the

companies, viz., Fourteen Thousand Three Hundred Sixty and no/100 ($14,360.00) Dollars. It is true that the Court allowed them Twelve Thousand and no/100 ($12,000.00) Dollars for "slats", which were first brought under consideration after the first submission.

These inconsistencies fall into the following categories:

1. **As to insurance.**

Plaintiffs made, and tried to sustain four separate claims as to insurance. These naturally involved questions of law, which could be decided only by a Court. Such matters were not within the province of an appraisal, which is limited to a determination of the amount of loss.

The Court decided against each of plaintiffs' contentions, and in favor of the position taken by the companies. This clearly takes the case out of the line of reasoning in the *Koyer* case, where the recovery was practically in conformity with plaintiffs' claims. The findings of the Court, in respect to these and other contentions bring this case within the reasoning of the *National Union* case, where no recoveries were made on the same basis as the claims.

The contentions as to insurance were:

a. That defendant insurance companies had agreed to insure this property for One Hundred Twenty Five Thousand and no/100 ($125,000.00) Dollars, an equal amount in each company, and recovery was sought against each company for $24,750, or a total of One

Hundred Twenty Three Thousand Seven Hundred Fifty and no/100 ($123,750) Dollars.

b. That defendant Agricultural had entered into an oral contract for One Hundred Twenty Five Thousand and no/100 ($125,000) Dollars, and recovery was sought against it for the sum of One Hundred Twenty Three Thousand Seven Hundred Fifty and no/100 ($123,750) Dollars.

c. That defendants had insured this property for Eighty-seven Thousand Five Hundred and no/100 ($87,500) Dollars, and recovery was sought against each for Seventeen Thousand Three Hundred Fifty and no/100 ($17,350) or a total of Eighty-six Thousand Seven Hundred Fifty and no/100 ($86,750) Dollars. The companies admitted issuing policies for Eighty-seven Thousand Five Hundred and no/100 ($87,500) Dollars, with Seventy Thousand and no/100 ($70,000) Dollars covering property at this location and Seventeen Thousand Five Hundred and no/100 ($17,500) Dollars covering at other locations. The Court found as contended by the companies.

d. Plaintiffs endeavored to recover Thirty-seven Thousand One Hundred Twenty-five and no/100 ($37,125) Dollars from their broker for failure to place that amount of extra coverage.

We realize, of course, that it is perfectly proper to plead alternative claims and inconsistent defenses. Here, however, we have four claims made in a verified complaint, which were all decided adversely to plaintiffs' contentions, and all decided in favor of defendants' claims.

Surely these claims could not be made certain by calculation, thus permitting recovery of interest.

2. **As to plaintiffs' pre-trial claims of quantities and values of lumber, for sixteen thousand and no/100 ($16,000.00) dollars, including two machines, which were not insured, and the property insured by these defendants.**

This was described as

> "CRATE, Fabricated Wood, Ponderosa and Sugar Pine."

It was further described as

> "Troughs, wood, Ponderosa and Sugar Pine grades ranging from #1 to #3, average #2. Dressed on 2 sides and worked. Air dried. Water stained, mfd. by Columbia Steel Mills, Minetto, N. Y.; stacked in 9 piles. Troughs of various lengths and widths ranging from 26 to 43 inches long, 1½ to 3 inch bottoms and 2½ inch sides ¾ inches thick. Nails spaced about 8 inches apart. Some indication of discoloration and decay due to open storage. Quantity 4,470,408 board feet. (Agreed Statement, p. 7.)"

Plaintiffs' contentions as to quantities were:

a. In their verified proofs of loss—

> "Approximately 5,000,000 board feet. Troughs were Ponderosa and Sugar Pine. Grades predominently #1 Grade. Dressed on two sides and worked. Air Dried. Water stained to prevent deterioration. Manufactured by Columbia Steel Mills, Minetto, New York. Ranging from 26 to 43 inches long. One-third to 3 inch bottoms, and 2½

inch sides; ¾ inches thick; nails spaced about five inches apart. Valued at One Hundred Twenty Five and no/100 ($125,000) Dollars." (Agreed Statement, p. 8.)

In the verified complaint, consisting of four counts, it was alleged:

> "That said property consisted of 5,000,000 board feet of lumber; that the value of said lumber at all of said times was One Hundred Twenty-Five Thousand and no/100 ($125,000) Dollars." (Agreed Statement p. 9.)

It is to be noted that neither in the proofs nor in the complaint, both under oath, was there any mention of or claim for "slats".

The quantities were raised from 4,470,408 board feet to 5,000,000. The grades were raised from "average #2" to "predominately #1". The value was raised from a purchase price of Sixteen Thousand and no/100 ($16,000) Dollars on June 26 (including the two machines) to One Hundred Twenty Five Thousand and no/100 ($125,000) Dollars on October 6.

The insurance companies admitted a value and loss of Fourteen Thousand Three Hundred Twenty and no/100 ($14,320) Dollars. The Court found a value and loss as to troughs of Nineteen Thousand One Hundred Fifty and 52/100 ($19,150.52) Dollars.

The Court found that instead of 5,000,000 feet of troughs there were 3,830,704. In addition, the Court found 100,000 board feet, or 200,000 slats. These it

valued at Twelve Thousand and no/100 ($12,000) Dollars.

The Court thus found an overclaim as to total board feet (3,830,704+100,000) of 1,069,296 board feet.

The Court found an overclaim as to value ($19,153.52+$12,000) of $92,596.48.

Once again, it cannot be claimed that this could "be made certain by calculation".

3. Plaintiffs' claims of quantities and values in Court.

Plaintiffs were not satisfied with the increases in quantities and values shown above. They introduced testimony in the original hearing from which they contended "that the Government invoices showed the quantity of lumber to be 5,078,950 and that actual measurement according to the testimony of witnesses showed 5,800,000 board feet." (Agreed Statement p. 10.)

They were forced to retract this and admit that the Government invoices showed 4,470,408 board feet and that the amount destroyed was 4,425,704 feet. (Agreed Statement p. 12.)

They also produced a "Summary of Minimum Valuation" (Agreed Statement p. 11) which they claimed showed values of One Hundred Ten Thousand and no/100 ($110,000) Dollars, One Hundred Sixteen Thousand and no/100 ($116,000) Dollars, and Two Hundred Twenty Thousand and no/100 ($220,000) Dollars.

Here for the first time "slats" were introduced into this case. It was claimed that "of the 4,425,704 board feet shown by said invoice, 690,412 board feet represented slats in the total quantity of 1,650,089". (Agreed Statement p. 13.)

This claim influenced the Court to permit plaintiffs to attempt to prove this claim.

> "After a protracted trial, necessitated by the reopening of the case in order to adduce additional testimony with respect to the quantity of slats involved * * *." (Agreed Statement p. 15.)

After three more hearings, the Court was forced to "estimate" an amount of slats. He found that instead of 690,412 board feet, there were 100,000 board feet. He also found that instead of 1,650,089 slats, there were 200,000.

We thus find an overclaim of 490,412 board feet and an overclaim of 1,450,089 slats.

When we find such overclaims on property not deemed worthy of mention in the verified proofs or complaint; when we find them brought up for the first time in the briefs after submission, resulting in a re-opening of the case; we cannot see how it could possibly be contended that the damages could "be made certain by calculation", so as to permit plaintiffs to recover interest.

We might add that at the later hearings, which were allowed by the Court solely for the purpose of determining whether there were slats, their quantity and

value, plaintiffs offered, and the Court refused testimony which would have shown a quantity in excess of 8,000,000 board feet.

At various places we have italicized parts of quotes for convenience and emphasis solely in order to aid this Court. We have not previously noted this in each case, as this brief is necessarily replete with references.

CONCLUSION.

It is respectfully submitted that the judgment of the trial Court be affirmed with costs.

Dated, San Francisco,
August 22, 1949.

THORNTON & TAYLOR,
Attorneys for Appellees.